IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON Respondent, v. ANTHONY GEORGE HERBERT, JR., Appellant.	No. 63067-9- I DIVISION ONE UNPUBLISHED OPINION FILED: March 15, 2010

J. Leach — Anthony George Herbert, Jr., was convicted in a stipulated bench trial of violating the Uniform Controlled Substances Act for possession of methamphetamine, RCW 69.50.4013. On appeal, he challenges the superior court's denial of his suppression motion, arguing that the court erred in determining the point at which the seizure occurred. Herbert contends that he was seized when the arresting officer shined a spotlight on him, asked him about a parked vehicle, and called him over to talk. We disagree. The superior court correctly determined that the seizure occurred later when the officer informed Herbert that he was not free to leave and obtained his identification. At this point, the officer had a reasonable and articulable suspicion that justified seizing Herbert. Accordingly, we affirm.

Background

On December 12, 2008, Deputy Marcus Dill was patrolling near the Lake

Hill Motel, located in the 14800 block of Highway 99 in Snohomish County. Dill, who was in uniform and in a marked vehicle, knew the motel was in an area known for narcotics trafficking, prostitution, vehicle prowls, and thefts. In his three years with the Snohomish County Sheriff's Office, he had responded to numerous calls relating to drug crimes and prostitution at the motel.[1] Around 12:30 a.m., Dill observed a Chevy Suburban pull into the motel parking lot even though the motel's large, red "NO VACANCY" sign was illuminated. Dill saw it parked with its headlights off but with its engine still running. He ran the vehicle's license plate number as part of his routine practice and discovered that the Suburban had been impounded as evidence in a criminal case within the past 30 days.

Dill then saw Herbert, who was the front seat passenger, exit the vehicle and look into the window of a work van parked in the same lot. Dill shined the spotlight of his patrol car on Herbert and asked if he owned the van. When Herbert said that the van did not belong to him, Dill called him over to his location about 20 feet away and asked Herbert what he was doing. Herbert stated that he and his friend were looking for a motel room for the night. Dill asked Herbert whether he understood what the "NO VACANCY" sign meant, and Herbert responded, "Oh, that's what that means."

Dill then informed Herbert that he was not free to leave and obtained his

[1] Dill testified that he had a total of almost 10 years of law enforcement experience, having previously worked at the Snohomish Police Department and Snohomish County Jail.

identification. While in Herbert's presence, Dill ran his name through radio dispatch. Before dispatch responded, Herbert told Dill that there might be an outstanding warrant for his arrest. Dispatch confirmed that there was such a warrant, and Dill handcuffed and read Herbert his Miranda[2] rights. Waiving his Miranda rights, Herbert told Dill that he would find a methamphetamine pipe on his person. Dill did. Dill transported Herbert to the jail, and there, in a second search, Dill found a baggie of suspected methamphetamine in Herbert's pants pocket. Herbert admitted that the baggie contained methamphetamine.

The State charged Herbert with one count of possession of methamphetamine. Herbert moved to suppress evidence of the methamphetamine, alleging that he was unlawfully seized. At the suppression hearing, Herbert denied looking into the work van and claimed that Dill had removed his identification card from his wallet, but the court found Dill's testimony more credible. The court further ruled that Dill had lawfully seized Herbert and denied Herbert's suppression motion. Herbert proceeded to a stipulated bench trial where he was found guilty as charged.

Analysis

Herbert bases his unlawful seizure claim upon the premise that his seizure occurred earlier than the superior court had determined. Herbert contends that he was seized when Deputy Dill shined his spotlight on him, asked him about the work van, and called him over to the patrol car. The superior court

[2] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

held that the seizure occurred later, when Dill obtained his identification.

A warrantless seizure is per se unreasonable under the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution unless one of the exceptions to the warrant requirement applies.[3] Accordingly, we must first determine whether a seizure occurred and then determine if a warrant exception justified that seizure.[4] Whether a seizure occurred is a mixed question of law and fact.[5] The trial court's factual findings are entitled to great deference, but whether those facts ultimately constitute a seizure is a question of law that this court reviews de novo.[6] Findings of fact entered in a suppression hearing, if challenged, are reviewed for substantial evidence while the conclusions of law are reviewed de novo.[7]

Under the federal and state constitutions, a seizure occurs when, in view

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[3] State v. Williams, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984) (citing Coolidge v. New Hampshire, 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971)). The Fourth Amendment, made applicable to the states through the Fourteenth Amendment, provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." Article I, section 7 of the Washington Constitution states that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." Article I, section 7 places a greater emphasis on the right to privacy than the Fourth Amendment. State v. Young, 123 Wn.2d 173, 179, 867 P.2d 593 (1994).

[4] State v. Mote, 129 Wn. App. 276, 283, 120 P.3d 596 (2005).

[5] State v. Thorn, 129 Wn.2d 347, 351, 917 P.2d 108 (1996), overruled on other grounds by State v. O'Neill, 148 Wn.2d 564, 62 P.3d 489 (2003).

[6] Thorn, 129 Wn.2d at 351.

[7] State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999), overruled on other grounds by Brendlin v. California, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007)..

of all of the circumstances surrounding the incident, a reasonable person would have believed that he or she was not free to leave due to the law enforcement officer's use of force or display of authority.[8] Circumstances that can indicate a seizure include "'the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.'"[9]

Herbert claims that he was seized when Deputy Dill shined his spotlight on him, asked him about the work van, and called him over to talk. But our courts have held that no seizure took place under similar circumstances. For example, in State v. O'Neill,[10] an officer saw a car parked in front of a closed store that had been burglarized twice in the previous month. Pulling into the parking lot, the officer shined his spotlight on the car.[11] The officer then approached the car, shined his flashlight in the driver's face, and asked the driver to roll down the window.[12] The driver complied, and when asked why he was there, he told the officer that the car would not start.[13]

In holding that the officer's initial contact was not a seizure, our Supreme Court pointed out that illumination by the police car spotlight or flashlight, without

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[8] O'Neill, 148 Wn.2d at 574; State v. Hansen, 99 Wn. App. 575, 578, 994 P.2d 855 (2000).

[9] State v. Young, 135 Wn.2d 498, 512, 957 P.2d 681 (1998) (quoting United States v. Mendenhall, 446 U.S. 544, 554, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980)).

[10] 148 Wn.2d 564, 571-72, 62 P.3d 489 (2003).

[11] O'Neill, 148 Wn.2d at 572.

[12] O'Neill, 148 Wn.2d at 572.

[13] O'Neill, 148 Wn.2d at 572.

additional indicia of authority, was not an unreasonable intrusion.[14] As support, the O'Neill court cited its decision in State v. Young,[15] where it held that no seizure took place when an officer shined a spotlight on a person in a public street at night since the spotlight only illuminated what was plainly visible during the day. The O'Neill court further noted that it was not improper for the officer to engage the driver in conversation in the store's parking lot.[16] On this point, the court cited with approval State v. Knox,[17] where the court held that no seizure occurred when an officer approached a vehicle parked on a ferry and repeatedly asked the sleeping driver to roll down the window. Because the circumstances here are similar to those in O'Neill, no seizure occurred when Deputy Dill shined a spotlight on Herbert, questioned him about the van, and called him over to talk.

Herbert nonetheless claims that State v. Stroud[18] supports his position. But in that case, the court held that the officers' activation of both their emergency lights and high beam headlights constituted a show of authority rising to the level of a seizure.[19] Because in this case Dill only used his spotlight, Stroud is distinguishable.

Accordingly, we reject Herbert's contention that he was seized when

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[14] O'Neill, 148 Wn.2d at 578.

[15] 135 Wn.2d 498, 510-13, 957 P.2d 681 (1998).

[16] O'Neill, 148 Wn.2d at 579 (citing Young, 135 Wn.2d at 511); see also State v. Nettles, 70 Wn. App. 706, 709, 855 P.2d 699 (1993) (asking citizen to step over to patrol car to talk was not a seizure).

[17] 86 Wn. App. 831, 832-33, 939 P.2d 710 (1997), overruled on other grounds by O'Neill, 148 Wn.2d at 571.

[18] 30 Wn. App 392, 634 P.2d 316 (1981).

[19] Stroud, 30 Wn. App. at 396.

Deputy Dill shined his spotlight on him and began questioning him. We agree with the superior court that the seizure occurred when Dill informed Herbert that he was not free to leave and obtained his identification.[20]

We further agree with the superior court that Dill's seizure of Herbert was valid under Terry v. Ohio[21] since Dill had a reasonable, articulable suspicion that Herbert was about to engage in criminal activity.

A Terry investigative stop is an exception to the warrant requirement.[22] "To justify a Terry stop under the state and federal constitutions, there must be some suspicion of a particular crime connected to the particular person, rather than a mere generalized suspicion that the person detained may have been up to no good."[23] The officer must have a "reasonable suspicion," based on "specific and articulable facts" that the person has been or is about to be involved in a crime.[24] In determining whether the officer's suspicion was reasonable, courts look to the totality of the circumstances.[25] This includes consideration of the officer's training and experience.[26]

Here, the totality of the circumstances shows that Deputy Dill had a reasonable suspicion that Herbert was about to engage in criminal activity. Dill was patrolling an area known for crimes that included vehicle prowls and theft.

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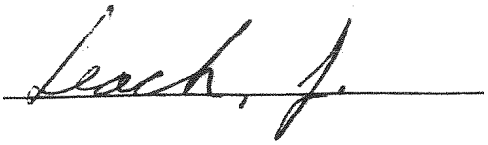
[20] See State v. Ellwood, 52 Wn. App. 70, 73, 757 P.2d 547 (1988) (telling citizen to "wait right here" constituted a seizure).
[21] Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).
[22] Ellwood, 52 Wn. App. at 73-74 (citing Terry, 392 U.S. at 21-22).
[23] State v. Bliss, 153 Wn. App. 197, 204, 222 P.3d 107 (2009).
[24] State v. Dorey, 145 Wn. App. 423, 429, 186 P.3d 363 (2008).
[25] State v. Randall, 73 Wn. App. 225, 229, 868 P.2d 207 (1994).
[26] State v. Glover, 116 Wn.2d 509, 514, 806 P.2d 760 (1991).

He observed a driver pull a Suburban into the motel's parking lot and turn off its headlights while keeping its engine running. A check of the license plate showed that the Suburban had been impounded as evidence in a criminal case within the past 30 days. While Herbert assigns error to this finding, substantial evidence supports it. The court based this finding on Dill's testimony, which it found credible. Dill then saw Herbert exit the vehicle and look into a van parked nearby. When asked if he owned the van, Herbert admitted that he did not. Herbert also told Dill that he was looking for a motel room despite the clearly visible "NO VACANCY" sign. Under these circumstances, Dill had a reasonable suspicion that Herbert was about to engage in a crime, namely, vehicle prowl or theft.

Conclusion

The superior court correctly determined that Herbert was not seized until Deputy Dill advised Herbert that he was not free to leave and obtained his identification. We further agree with the court's conclusion that Dill's seizure of Herbert was supported by a reasonable, articulable suspicion under Terry.

Affirmed.



WE CONCUR: